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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JARROW INDUSTRIES, INC., Plaintiff and Appellant, v. KOKOZIAN & NOURMAND, LLP, et al., Defendants and Respondents.	B199597 (Los Angeles County Super. Ct. No. BC364689)

APPEAL from two orders of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. The first order affirmed; the second order reversed and remanded.

Lawrence C. Jones for Appellant.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman and Barry Zoller for Respondents Kokozian & Nourmand, Michael Nourmand, and Bruce Kokozian.

Nemecek & Cole, Jonathan B. Cole, David B. Owen, March Schaeffer; Fink & Associates and Keith A. Fink for Respondent Sarah H. Hernandez.

INTRODUCTION

After Jarrow Industries, Inc. (Jarrow), was successful in obtaining terminating sanctions against a former employee who had sued it for wrongful termination, Jarrow sued the employee's former attorneys for malicious prosecution. The attorneys responded with a special motion to strike. (See Code Civ. Proc, § 425.16 (hereafter section 425.16).) The trial court granted the motion, finding Jarrow could not demonstrate the probable success of the action because the wrongful termination suit did not end in its favor on the merits, but rather was dismissed due to a discovery sanction.

Jarrow appeals this order, as well as the trial court's subsequent order granting attorney fees. We affirm the order granting the motion to strike, but reverse the amount of fees awarded.

FACTUAL AND PROCEDURAL BACKGROUND

Nancy Maria retained Kokozian & Nourmand, LLP (K&N), to file a wrongful termination action against Jarrow, her former employer. K&N did so with a complaint alleging Jarrow had unlawfully terminated Maria due to her pregnancy. After 13 months of litigating the case for Maria, K&N filed a motion to withdraw as counsel because of a breakdown in the attorney-client relationship. Neither Maria nor Jarrow opposed the motion, which the trial court granted. Maria did not get new counsel. Four months later, the trial court granted Jarrow's motion for terminating sanctions and dismissed the action because Maria had failed to appear for her third scheduled deposition ordered by the court.

Jarrow later filed a malicious prosecution action against K&N, its principals, Bruce Kokozian and Michael Nourmand, and Sarah E. Hernandez, a former K&N attorney who had worked on Maria's case. The firm and its principals will be referred to as K&N. Maria was also sued, but she never appeared in the action and is not involved in this appeal. In response to the complaint, K&N and Hernandez each

filed a special motion to strike. They both argued, among other things, that Jarrow could not establish a probability of prevailing on its claim for malicious prosecution because the termination of the underlying action was not on the merits but rather was a discovery sanction due to Maria's failure to appear for her deposition. Thus, they argued, such a dismissal does not satisfy the favorable termination element of the cause of action. Jarrow opposed the motions, essentially arguing the action was terminated on the merits because the discovery sanction was indicative of K&N and Hernandez's estimation that Maria's case had no merit.

The trial court agreed with K&N and Hernandez and granted the motions. Later, the court granted attorney fees pursuant to section 425.16, subdivision (c)--$100,000 for K&N, and $50,000 for Hernandez.

Jarrow appeals both orders.

DISCUSSION

1. Principles Governing Special Motions to Strike.

Resolving the merits of a special motion to strike requires "a two-part analysis, concentrating initially on whether the challenged cause of action arises from protected activity within the meaning of the statute and, if it does, proceeding secondly to whether the plaintiff can establish a probability of prevailing on the merits." (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.) Jarrow concedes K&N and Hernandez made a threshold showing that the malicious prosecution action arose from protected activity. As a result, we need to consider only whether Jarrow met its burden of demonstrating a probability of prevailing on its malicious prosecution claim. (*Ibid*.)

To establish a probability of prevailing on its claim, Jarrow was required to demonstrate its complaint was not only legally sufficient, but supported by a prima facie showing of facts sufficient to sustain a judgment in its favor if the evidence submitted is credited. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th

260, 291 (*Soukup*).) We review the trial court's ruling on the motion de novo by conducting an independent review of the record. (*Id.* at p. 269, fn. 3.)

2. *The Elements of Malicious Prosecution.*

A successful malicious prosecution claim must show the prior lawsuit (1) terminated on the merits in favor of the plaintiff, (2) was initiated without probable cause, and (3) was initiated with malice. (*Soukup, supra,* 39 Cal.4th at p. 292.) To defeat a special motion to strike, Jarrow was required to establish a probability of success as to all three elements. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875.) Thus, if a defendant filing a special motion to strike demonstrates that one element cannot be established, the trial court must grant the motion to strike, as it did in this case.

As we discuss below, the first of these elements--favorable termination--is dispositive in this case because Jarrow has not shown Maria's wrongful termination action was terminated on the merits.

3. The Prior Lawsuit Was Not Terminated on the Merits.

The favorable termination element of a malicious prosecution action is established by showing that the termination of the prior lawsuit reflected on the merits of the action and the malicious prosecution plaintiff's lack of responsibility or liability for the alleged misconduct. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 198.) In other words, the plaintiff must demonstrate that the termination reflects on his or her innocence in the underlying action. (*Pattiz v. Minye* (1998) 61 Cal.App.4th 822, 827 (*Pattiz*).)

"If the termination does not relate to the merits--reflecting on neither innocence of nor responsibility for the alleged misconduct--the termination is not favorable in the sense it would support a subsequent action for malicious prosecution." (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751, fn. omitted.) "The

test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt. [Citations.] The focus is not on the malicious prosecution plaintiff's opinion of his innocence, but on the opinion of the dismissing party. [Citation.]" (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 881, italics omitted.)

We agree with the trial court that Jarrow failed to establish Maria's underlying employment action was terminated in its favor on the merits. Indeed, the dismissal of the action had nothing to do with the merits of the wrongful termination suit. Instead, the trial court dismissed the case as a discovery sanction because Maria, representing herself, had chosen to disobey an order that she appear for her deposition. The trial court in the wrongful termination action made clear that the dismissal did not reflect on the merits when it expressly denied Jarrow's request for a finding, as part of the discovery sanction, that Maria and her counsel brought the action "without probable cause." Thus, the dismissal did not reflect on Jarrow's innocence or the merits of the wrongful termination action.

Even assuming Maria's failure to comply with discovery could be treated as a concession that the action, in her opinion, lacked merit, such conduct or concession is not attributable to her attorneys. (See *Zeavin v. Lee* (1982) 136 Cal.App.3d 766, 771-772 (*Zeavin*); *Pattiz, supra*, 61 Cal.App.4th at p. 827; *De La Pena v. Wolfe* (1986) 177 Cal.App.3d 481, 484-485 (*De La Pena*).) In *Zeavin*, an attorney filed a malpractice suit against two physicians on behalf of his client. The court dismissed the action when the patient/client refused to cooperate with her attorney and did not respond to interrogatories or appear at her deposition. The physicians sued the attorney for malicious prosecution. The appellate court held the dismissal of the malpractice action was not a favorable termination on the merits because it did not reflect the innocence of the physicians or the lack of merit of the malpractice action. More importantly, the court refused to impute the client's conduct to the attorney:

"It would be beyond law or reason to conclude that an attorney who in good faith files and diligently prosecutes an action could later be held liable for malicious prosecution solely because that attorney's client later unilaterally, and for reasons known only to herself, refuses to make discovery. We decline to do so. [¶] . . . [¶] While it may sometimes be proper to hold that a prior action was unfavorably terminated against a party solely because of her conduct in refusing to cooperate or make discovery or by reason of her unilateral abandonment of that action, the attorney is not the insurer of his client's conduct, and the law wisely places no such burden on that party's *attorney* solely by reason of his client's conduct in that regard." (*Zeavin, supra,* 136 Cal.App.3d at pp. 772-773.)

Similarly, in *Pattiz,* the underlying complaint was dismissed because the client, represented by an attorney, failed to comply with the court's discovery orders. In the malicious prosecution action against the client and her attorney, the appellate court held the dismissal was not a favorable termination on the merits. As to the action against the attorneys, the court said, "The malfeasance or dereliction of a client is not imputed to his or her attorney." (*Pattiz, supra,* 61 Cal.App.4th at p. 828; see also *De La Pena, supra,* 177 Cal.App.3d at pp. 484-485 [dismissal as discovery sanction not favorable termination on the merits and client's conduct not imputed to attorney].)

As in the above cases, we conclude the dismissal of Maria's case as a discovery sanction was not on the merits so as to support a malicious prosecution action against Maria's attorneys. Jarrow argues, nonetheless, that the above cases are not dispositive and we should follow *Ross v. Kish, supra,* 145 Cal.App.4th 188. We decline to do so because the case is not applicable.

In that case, Kish, representing himself, sued Ross in the underlying action for legal malpractice. After Kish failed to appear for his court-ordered deposition, Ross filed a motion for dismissal as a terminating discovery sanction. Kish neither opposed the motion nor appeared at the hearing, so the court dismissed the case.

Distinguishing *Zeavin*, *Pattiz*, and *De La Pena*, the court held these facts indicated Kish's *own* concession that the case lacked merit and thus were the equivalent of *his* failure to prosecute, which constitutes a favorable termination on the merits. (*Ross v. Kish*, *supra*, 145 Cal.App.4th at pp. 198, 200-201, citing *Minasian v. Sapse* (1978) 80 Cal.App.3d 823, 827-828.)

Unlike *Ross v. Kish*, we are presented here with a malicious prosecution case against the attorneys, not the party. In holding that Kish's failure to appear at his deposition and the resulting terminating sanction constituted a favorable termination on the merits against Kish, the court said, "[A]ttendance at a deposition is a matter exclusively within Kish's control." (*Ross v. Kish*, *supra*, 145 Cal.App.4th at p. 200.) Not only is there no evidence Maria's attorneys abandoned or otherwise failed to prosecute the action, but it is undisputed that they were relieved as counsel for Maria prior to her court-ordered deposition and four months before dismissal of the case. Accordingly, *Ross v. Kish*, the sole authority on which Jarrow relies, has no application here.

Jarrow further argues that K&N and Hernandez's own discovery misconduct was so "inextricably intertwined" with Maria's conduct that it somehow reflects on their estimation that the wrongful termination action had no merit. For example, Jarrow complains that, during Maria's deposition, Hernandez instructed her to not answer 55 questions and the trial court granted Jarrow's motion to compel a further deposition, which resulted in monetary sanctions against Hernandez. Jarrow also says Maria's attorneys delayed scheduling the next deposition and, when it finally did happen, Nourmand announced K&N was withdrawing as counsel and cancelled the deposition. We reject Jarrow's argument that these facts are relevant or amount to a concession regarding the merits of Maria's case. These events, even if unjustifiable, are merely evidence of contentious civil litigation, not of favorable termination on the merits.

4. The Attorney Fees Order Is Reversed.

Section 425.16, subdivision (c), provides, "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. . . ." To be awarded, however, attorney fees must be reasonable and limited to the motion to strike. (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 362; *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 381-382.) A fee award under section 425.16 is reviewed for abuse of discretion. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) An abuse of discretion is shown when the award shocks the conscience or is not supported by the evidence. (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549-550.)

K&N had two law firms representing it. The trial court awarded K&N a total of $100,000--$55,000 for one firm (Lewis Brisbois Bisgaard & Smith) and $45,000 for the other (Theodora Oringher Miller & Richman). The total amount of time billed by these two firms for a single motion was about 400 hours. Hernandez also had two sets of counsel and was awarded $50,000--$26,000 for the firm (Nemecek & Cole) that actually prepared a motion substantially similar to K&N's motion, and $24,000 for "personal counsel" (Keith Fink), who did not even prepare the motion. Jarrow challenges these fees as unreasonable and unfounded in several respects.

First, Jarrow contends the fees are excessive because K&N and Hernandez did not demonstrate two sets of counsel for each of them did not result in a duplication of effort. This contention is well taken. The evidence indicates Lewis Brisbois took the lead on behalf of K&N in preparing the motion and billed $55,000. Yet Theodora Oringher, which did not file the motion, billed almost the same amount. The same is true for Hernandez's counsel. Having each chosen to be represented by two sets of counsel, we believe it was incumbent on K&N and Hernandez to demonstrate that

such double representation did not unnecessarily and unreasonably duplicate the effort and the resulting fees. They made no such showing.[1]

Second, Jarrow argues K&N and Hernandez's fees should be limited to those incurred in preparing the motions responding to the operative malicious prosecution complaint, not a prior malicious prosecution action Jarrow had previously voluntarily dismissed. Some explanation is in order. Jarrow filed its first malicious prosecution complaint in June 2006. In January 2007, Jarrow voluntarily dismissed the complaint and on the same day re-filed a new malicious prosecution action, the one that resulted in the special motions to strike at issue. Jarrow contends the approximately $60,000 in fees incurred prior to January 2007 is not recoverable. (Cf. *S. B. Beach Properties v. Berti*, *supra*, 39 Cal.4th at pp. 384-385 [section 425.16 fees not allowed for work done in connection with a voluntarily dismissed complaint].) This contention has some, but only some, merit. While we understand that some of the fees incurred prior to January 2007 in preparing to respond to Jarrow's complaint would probably have been incurred in responding to the later operative complaint, K&N and Hernandez did not present evidence of this fact. We believe they were required to show the fees incurred prior to January 2007 were appropriate and reasonable because it avoided repetition of work to respond to the later operative complaint.

Finally, Jarrow asserts Mr. Fink's fees should have been disallowed because there was insufficient evidence to support the actual time and nature of the work he

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[1] Counsel for Hernandez indicated during oral argument that Fink and Theodora Oringher were acting as *Cumis* counsel, either because Jarrow's malicious prosecution complaint sought punitive damages, which were not covered by the applicable liability insurance, or for some other reason. (See *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364; Civ. Code, § 2860.) We understand a party may have the right to independent counsel in addition to insurer-retained counsel in such circumstances. But such a right does not mean *all* fees incurred by both *Cumis* counsel and insurer-retained counsel must automatically be reimbursed upon the insured's successful motion to strike if the work by the two sets of counsel resulted in an unnecessary and unreasonable duplication of effort and fees.

performed that related to the motion to strike. We agree in part. Mr. Fink provided two sparse and vague declarations in which he said he spent 49.5 hours, at $450 per hour. He very generally said he had "numerous discussions" with other counsel, spent an undisclosed amount of time "revising letters and pleadings," and "work[ing] on discovery." He attached certain documents to his declaration.

There is no doubt Mr. Fink did considerable work on Hernandez's behalf. The problem is that he did not provide a single accounting of how much time he spent on any individual task or how that task related to Nemecek & Cole's motion to strike. More importantly, without some sort of accounting, including the dates services were rendered, we are unable to distinguish between his work and that of other counsel in order to determine whether there was any unnecessary and avoidable duplication of effort and fees. The lack of information also prevents us from evaluating whether Mr. Fink's services that were performed prior to January 2007 were appropriate and reasonable because they were useful to the SLAPP motion filed in response to Jarrow's second complaint. Conversely, they may not have been material to that motion, but neither we nor the trial judge have any way of knowing. Because we remand for further proceeding on other aspects of the attorney fees order, we conclude it is best for the trial court to make a further determination in keeping with our opinion.

DISPOSITION

The order granting the special motion to strike is affirmed. The order awarding attorney fees is reversed. The matter is remanded for reconsideration of the fee award. Specifically, the trial court shall conduct a new hearing and determine, among other things, whether (1) the use of two sets of counsel resulted in a duplication of effort and fees, which should be disallowed, and (2) the fees incurred prior to January 2007 were appropriate and reasonable because it avoided repetition of work that would have been performed to respond to Jarrow's later complaint.

The parties are to bear their own costs on appeal.

RUBIN, Acting P. J.

We concur:

BIGELOW, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.